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In The

Supreme Court of the United States

NICK FURFARO; BRANDY KIDDER; ESMERALDA SILVA; AND JJR, INC.,

Conditional Cross-Petitioners,

v.

CITY OF SEATTLE,

Conditional Cross-Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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CONDITIONAL CROSS-QUESTIONS PRESENTED

1. Whether the requirement, under First and Fourth Amendments, that a police officer obtain a constitutionally sufficient warrant before seizing books or films pursuant to an anti-obscenity statute, also applies to arrests of live dancers and individual promoters for violating the same kind of statutes.

2. Whether the Fourth Amendment rule that ordinarily permits arrests to be validated by post-arrest determinations of probable cause applies to arrests of individuals involved in presumptively protected expression.

STATEMENT PURSUANT TO RULE 29.6

JJR, Inc. has no corporate parent. Nor does any publicly held company own ten percent or more of JJR's stock.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Nick Furfaro, Brandy Kidder, Esmeralda Silva, and JJR, Inc. ("Cross-Petitioners") conditionally cross-petition for a writ of certiorari to the Washington Supreme Court in *Furfaro v. City of Seattle*, No. 68691-7 (as amended on Dec. 5, 2001).

OPINIONS BELOW

The amended decision of the Washington Supreme Court, which is reproduced in the Appendix to the City of Seattle's Petition for Certiorari in No. 01-1316 ("Pet. App.") 1-27 and Pet. App. 46-48, is reported at 27 P.3d 1160 (Wash. 2001), and 36 P.3d 1005 (Wash. 2001). The Washington Court of Appeals' decision, which is reproduced at Pet. App. 28-45, is reported at 984 P.2d 1055 (Wash. App. 1999). The trial court's decisions in this case are unreported.

JURISDICTIONAL STATEMENT

The Washington Supreme Court entered an amended opinion in this matter on December 5, 2001. Pet. App. 46-68. That amended opinion finally determined some federal issues in this case and remanded other federal and state issues to the Washington Court of Appeals, where this case is currently pending. The Washington Supreme Court recalled its mandate in this matter on January 7, 2002, Appendix to Brief in Opposition ("Opp. App.") 27, and has not re-issued it, thereby indicating that its December 5 amended decision is interlocutory in nature.

Jurisdiction in this Court is invoked under 28 U.S.C. § 1257(a), as that provision is elucidated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and its progeny. The basis for this Court's jurisdiction is further discussed *supra* in section III.B.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution in part provides:

> Congress shall make no law . . . abridging the freedom of speech. . . .

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1 of the Fourteenth Amendment to the United States Constitution in part provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Title 42 United States Code § 1983 in part provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Seattle Municipal Code (SMC) 6.270.100 provides in part:

> A(2) No employee or entertainer shall perform acts of or acts which simulate:

a. Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, or any sexual acts prohibited by law;

b. The touching, caressing or fondling of the breasts, buttocks, or genitals; or;

c. The displaying of the pubic region, anus, vulva, or genitals; except as provided for in subdivision 1 of this subsection.

C. This chapter shall not be construed to prohibit expression, such as:

1. Plays, operas, musicals, or other dramatic works that are not obscene.

2. Classes, seminars, and lectures held for serious scientific or educational purposes that are not obscene; or

3. Exhibitions performances, expressions or dances that are not obscene.

D. For purposes of this chapter, an activity is "obscene" if:

1. Taken as a whole by an average person applying contemporary community standards the activity appeals to a prurient interest in sex;

2. The activity depicts patently offensive representations, as measured against community standards, of:

a. Ultimate sexual acts, normal or perverted, actual or simulated, or

b. Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area, or violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

3. The activity, taken as a whole lacks serious literary, artistic, political, or scientific value.

STATEMENT OF THE CASE

A. Background

Rick's is a non-alcoholic nightclub in Seattle that features nude dancing by female entertainers. Individual dancers perform strip tease routines in rotation on a stage accompanied by pre-recorded music. Each dance lasts two to three minutes, the length of a song.

On November 20, 1995, Seattle Police Detective Ken Swanson entered Rick's in an undercover capacity. As part of a pre-planned vice unit operation, Detective Swanson was investigating whether dancers were violating Seattle Municipal Code (SMC) 6.270.100(A)(2), by touching themselves on the breasts, buttocks, genitals or anus, or engaging in simulated masturbation, while performing on stage. Detective Swanson sat in front of the main stage and, using a hidden tape recorder, recorded his observations of each of the dancers as they performed in succession on stage. Detective Swanson would turn on the tape recorder and make a verbal notation when he saw dancers touch or "massage" themselves in their private areas. However, he made no effort to observe the entire performances, nor to determine whether they were obscene.

After recording his observations, Detective Swanson left the business and met with other vice unit officers at a pre-arranged location. A group of officers then entered Rick's and arrested thirteen dancers and the manager based on Detective Swanson's observations. When the officers entered the business, the lights were turned on and the customers were invited to leave. The dancers who were arrested were required to change clothes, hand over their costumes as evidence, and were taken to jail. The business was closed for approximately an hour and twenty minutes while the arrests were being made.

It was uncontested at trial that all acts leading to the arrests occurred while the individual dancers were performing dances. Opp. App. 20. In his testimony, Detective Swanson described the dancing of Darcy Poole, one of the

entertainers arrested in the raid. He testified that Poole was dancing and moving "in sync" with the music. She did not stop dancing to touch herself in private areas, but rather the "touching" was interspersed throughout the entire performance. The touching lasted two to three seconds. Opp. App. 16. Poole removed her costume slowly as part of a strip tease routine. Detective Swanson testified that all the performances that he observed that day were similar to that of Poole. Opp. App. 17. All the entertainers appeared to be dancing, and the touching was part of their dance.

In making their determination of probable cause, the arresting officers were exclusively concerned with whether dancers touched themselves on prohibited body parts. They paid no attention to the performances as a whole and did not consider obscenity. Captain Dan Oliver, the commanding officer of the operation, testified that if a dancer was touching herself on her breast she would be arrested, "even if she was doing a ballet." Opp. App. 23.

Chief of Police Norm Stamper testified that the Seattle Police Department has a policy of using a variety of methods and techniques to attempt to influence the behavior within the adult entertainment industry. One of these techniques includes making warrantless physical arrests when officers had probable cause to believe that entertainers had touched themselves in the private areas while dancing on stage. During intra-departmental discussions that preceded the arrests in this case, Chief Stamper and others determined that, in implementing this policy, officers would not consider the issue of obscenity in determining whether to arrest individuals for violations of SMC 6.270.100. When Chief Stamper learned of the arrests at Rick's, he gave his approval to what had occurred as following the dictates of department policy.

All of the dancers who were arrested were charged in the Seattle Municipal Court with violating SMC 6.270.100. One of the dancers went to trial and was acquitted. The

charges against the remaining dancers were dismissed. Pet. App. 29.

B. Procedural History

Upon termination of criminal proceedings, Cross-Petitioners filed this civil action in state court. Cross-Petitioners sought injunctive and declaratory relief and damages pursuant to 42 U.S.C. § 1983 based upon violation of their rights under the First, Fourth and Fourteenth Amendments. Cross-Petitioners maintained that the arrests and temporary closure of the business violated their First and Fourth Amendment rights because the police lacked a warrant for making the arrests, the officers failed to consider obscenity in their determination of probable cause, and probable cause was lacking here. They also sought injunctive and declaratory relief based upon violation of their rights under the freedom of expression and privacy provisions of the Washington Constitution.

Prior to trial, the trial court granted partial summary judgment to the City, ruling that the police were not required to obtain a warrant and that the individual officers named as defendants in the lawsuit were immune. The matter then proceeded to trial on the issue of probable cause and damages. The trial court reserved ruling on the claims for injunctive and declaratory relief under the State Constitution until after trial. In the course of its deliberations, the jury sent out a written question asking whether the officers were required to consider obscenity in making their determination of probable cause. Over the Cross-Petitioners' objection, the trial court instructed the jury that the officers were required to consider obscenity in making an arrest for expression but not if they were making an arrest for conduct. The jury proceeded to return a verdict for the City. Following the verdict, the trial court dismissed all of Cross-Petitioners' remaining claims.

Cross-Petitioners appealed the judgment directly to the Washington Supreme Court, which transferred the

case to the Court of Appeals.[1] In their brief, Cross-Petitioners argued that the arrests were unlawful under both the federal and state constitutions. The Court of Appeals unanimously reversed the judgment on solely federal grounds, holding that the police violated the First and Fourth Amendments when they arrested Cross-Petitioners for their stage performances, without first obtaining a warrant based on a judicial determination of obscenity. Pet. App. 28-45. The Court of Appeals ordered the case remanded to the trial court for a determination of damages under § 1983, as well as a reconsideration of the availability of injunctive and declaratory relief under the federal and state constitutions. Pet. App. 45.

Before that remand could be carried out, the City petitioned for review of the Court of Appeals' decision in the Washington Supreme Court, and the request for review was granted. A majority of the Washington Supreme Court affirmed the judgment of the Court of Appeals but on different grounds. Pet. App. 1-27. The Court held that a warrant was not required under the First and Fourth Amendments and that Cross-Petitioners' state constitutional claims did not give rise to a cause of action under Title 42 U.S.C. § 1983. However, the Washington Supreme Court held that the police were required to consider obscenity in their determination of probable cause and, therefore, that the jury was erroneously instructed that obscenity need not be considered. The majority remanded the case for a trial on the question of whether there was probable cause to believe that the

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[1] Under Wash. R. App. Proc. 4.2(a)(4), a party may seek direct review of a trial court decision by the Washington Supreme Court if the case involves "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." After the appeal is filed directly in the Washington Supreme Court, the Court may decide that grounds for direct review do not exist, in which case the matter is transferred to the Court of Appeals. *See* Wash. R. App. Proc. 4.2(e).

dancing was obscene and for a calculation of damages under § 1983. Justice Sanders concurred "only with the majority's result for the reasons so well articulated by Judge Becker on behalf of the Court of Appeals." Pet. App. 25-26.

Cross-Petitioners filed a timely motion for reconsideration in the Washington Supreme Court. In the motion, Cross-Petitioners argued the Court incorrectly stated in its opinion that the only issue raised on appeal was Cross-Petitioners' claim for damages under § 1983 and the Court improperly failed to address their claim for injunctive and declaratory relief under the state constitution. Cross-Petitioners asked the Court, pursuant to state rules of appellate procedure, either to consider the merits of their state constitutional claims or remand them for determination by the Court of Appeals.[2] The Washington Supreme Court granted reconsideration and changed its opinion. In the order granting reconsideration, the Court deleted the language from its opinion which precluded Cross-Petitioners from seeking injunctive and declaratory relief under the federal and state constitutions and it remanded the case to the Court of Appeals, "to consider the availability of injunctive and declaratory relief under the state constitution and issues left unresolved by this opinion." Pet. App. 47. The case is currently pending in the Washington Court of Appeals, which has issued a supplemental briefing schedule with respect to Cross-Petitioners' state constitutional claims. Briefing is due to be completed in late May of 2002. Opp. App. 25-27.

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[2] Wash. R. App. Proc. 13.7(b) in pertinent part provides, "If the Supreme Court reverses a decision of the Court of Appeals that did not consider all the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues."

REASONS FOR GRANTING THE CONDITIONAL CROSS-WRIT

Conditional Cross-Petitioners ("Cross-Petitioners") have filed (concurrently with this brief) an opposition to the City's petition for a writ of certiorari, which maintains that this Court lacks jurisdiction over the City's petition because there is not yet a "final judgment" (or any acceptable substitute for such a judgment) from the Washington State courts regarding either of the questions that the City presents. Cross-Petitioners believe that the proper course here is for the parties further to litigate this case in the Washington Court of Appeals (and then, if necessary, again in the Washington Supreme Court) before presenting any questions before this Court. Our brief in opposition also contends that, in any event, this Court should deny the City's petition because the questions it presents are not worthy of this Court's review.

If this Court, however, decides to review the City's petition, Cross-Petitioners respectfully urge this Court to grant this Conditional Cross-Petition for a Writ of Certiorari as well. Consideration of the two questions it presents is essential for a complete review of the federal constitutional claims and police practices at issue in this case. As even the City acknowledges, the central subject of this case is what procedures police officers must follow before arresting individuals for alleged violations of the misdemeanor offense codified at SMC 6.270.100. *See* Pet. 23 ("[T]he States need an answer from this Court as to how lawful arrests under such statutes can be made.") This matter of "how lawful arrests under such statutes can be made," *id.*, presents issues not only regarding whether (i) probable cause must exist to believe that arrested individuals are engaged in unprotected, obscene conduct in contravention of the statute, but also whether police officers must (ii) obtain, before making any arrest, a constitutionally sufficient warrant on the basis that the expression at issue is obscene or (iii) at least themselves make an actual pre-arrest determination on that basis.

Each of these three issues is inextricably intertwined with the others. Yet the two questions in the City's petition for certiorari presents only the first of these three issues.

The City, for example, asserts in its petition that requiring police officers to consider whether they are witnessing obscene conduct before arresting individuals pursuant to SMC 6.270.100 would place "obvious and significant . . . burdens" on officers. Pet. 23. To the extent that this is so, the natural way to relieve this burden is to hold that neutral magistrates, rather than police officers, must undertake this threshold obscenity consideration and issue arrest warrants only upon a finding that the entertainment at issue is unprotected expression. At the very least, this Court should make clear whether police officers must actually conclude that the expression at issue is obscene before making an arrest or whether they may ignore that issue on the hopes that their arrests will be validated by facts established in *post hoc* judicial proceedings.

Similarly, the City asserts that the First Amendment does not "automatically" extend to all activities that may take place inside an adult entertainment establishment. Pet. 15, 20-21. Cross-Petitioners do not contest this proposition. But since at least some (if not all) *stage dancing* in such establishments is unquestionably entitled to First Amendment protection, *see, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), it is necessary for someone to determine whether the activity at issue is protected expression or unprotected conduct. The critical question is who should make that determination: a police officer or a neutral judicial officer. This Court should not consider that question without granting this conditional cross-petition.

What is more, as the foregoing analysis explains, review of the warrant issue presented here – in contrast to the issues that the City presents – would resolve a legal disagreement in the lower courts and prevent the Washington Supreme Court's new and unsubstantiated rule

that the First Amendment affords less protection to non-verbal live entertainment than to verbal entertainment from infecting the fabric of free expression jurisprudence. Review of the *post hoc* determination issue similarly would clarify the scope of an important Fourth Amendment rule and explain how it meshes with the longstanding First Amendment right to be free from prior restraints in the absence of at least some kind of initial determination that the expression at issue is not constitutionally protected.

I. THIS COURT SHOULD RESOLVE THE ISSUE WHETHER POLICE OFFICERS MUST OBTAIN WARRANTS BEFORE ARRESTING LIVE ENTERTAINERS OR INDIVIDUAL PROMOTERS FOR VIOLATIONS OF AN ANTI-OBSCENITY ORDINANCE.

In a series of cases beginning with *Marcus v. Property Search Warrant*, 367 U.S. 717 (1961), and *Roaden v. Kentucky*, 413 U.S. 496 (1973), this Court has held that before seizing books or films pursuant to a statute that prohibits obscene expression, the First and Fourth Amendments require police officers to obtain a "constitutionally sufficient warrant" – that is, a warrant from a neutral, detached judicial officer finding that the expression at issue is obscene. *See also Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (warrantless seizure of books and films unconstitutional); *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986) (upholding seizure of film because officers obtained sufficient warrant); *Heller v. New York*, 413 U.S. 483 (1973) (upholding seizure of film and arrests of promoters because the officers obtained a warrant from a neutral magistrate); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968) (per curiam) (seizure of film unconstitutional because magistrate failed to make independent determination of obscenity); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964). The reason for this rule is that "constitutionally protected expression . . . is often separated from obscenity by a dim and uncertain line,"

Bantam Books v. Sullivan, 372 U.S. 58, 66 (1963), and the risk of "prior restraint of the right of free expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness." *Roaden*, 413 U.S. at 504.

This Court has held that live entertainment is entitled to the same level of First Amendment protection against prior restraints as are books and films. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975). It likewise is well settled that individuals are entitled to at least as much Fourth Amendment protection against warrantless and otherwise unreasonable seizures as are inanimate objects. *See, e.g., Steagald v. United States*, 451 U.S. 204, 213 (1981); *Payton v. New York*, 445 U.S. 573 (1980). But this Court has never squarely addressed the issue whether the warrant requirement enunciated in *Marcus* and *Roaden* applies to arrests of live entertainers or individual promoters of allegedly obscene material. In fact, in *Maryland v. Macon*, 472 U.S. 463 (1985), this Court expressly reserved "the question whether the Fourth Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution of obscene materials." *Id.* at 471.

The failure of this Court to declare whether the warrant requirement that applies to seizures of books and films also applies to seizures of live entertainers and promoters has resulted in a patchwork of contradictory rulings in our Nation's most populous areas. It is critical for this Court to address this issue and to hold that, just as in the context of seizing books or films, police officers must obtain a constitutionally sufficient warrant before arresting any live performer or promoter for violating an anti-obscenity ordinance. Indeed, if anything, individuals should be entitled to more protection under the First and Fourth Amendments, for arresting individuals – unlike seizing books or films – entails a deprivation of personal liberty and also may terminate a constitutionally protected exhibition that can never again be duplicated.

A. State and Federal Courts Are Divided Regarding Whether Police Officers Must Obtain Warrants Before Arresting Live Entertainers or Promoters for Violations of an Anti-Obscenity Ordinance.

Courts in the United States' most populous regions persistently have disagreed over whether the First and Fourth Amendments' requirement that police officers obtain constitutionally sufficient warrants before seizing books or films for potential violations of anti-obscenity statutes also applies to arrests of live entertainers and promoters for violations of the same kinds of statutes. The trial court in this case held that no warrant is necessary when officers arrest such individuals in adult entertainment establishments. The Washington Court of Appeals, however, reversed this decision and unanimously held that "[w]e cannot dispense with the warrant requirement for live performances. . . . The controversial content of human expressive activity does not have to be captured in a film canister or within the covers of a book to make it worthy of protection." Pet. App. 41-42. The Washington Supreme Court divided on the issue. The majority sided with the trial court, holding that the First and Fourth Amendments' warrant requirement did not apply to "nonverbal nude dancing of the sort found in adult entertainment establishments." Pet. App. 11. Justice Sanders disagreed, stating that "[t]he majority's claimed distinction between the admitted necessity of a warrant to seize a videotape and the supposed propriety of a warrantless arrest of a performer in midperformance defies common sense. . . . The principle is the same in either case." Pet. App. 26.

Not only have judges in the State of Washington sharply disagreed concerning the applicability of the warrant requirement to live performances and promoters, but federal and state courts in other jurisdictions (and often within the same jurisdiction) also have reached conflicting results on this issue – with six of these nine decisions

holding that warrants *are* required for such arrests. In *Admiral Theatre v. City of Chicago*, 832 F. Supp. 1195 (N.D. Ill. 1993), police officers, just as in the instant case, "arrested all of the dancers present at [a nightclub's] premises based on the officers' belief that the dancers' expressive conduct was obscene and not protected by the Constitution." *Id.* at 1204. The Northern District of Illinois (which covers Chicago) declined to distinguish between expressive objects and live entertainment and held that the dancers' claim that their midperformance arrests "based on a *nonjudicial* determination that the *content* of their expression was constitutionally unprotected obscenity" alleged a violation of the First and Fourth Amendments. *Id.* (first emphasis added). Another federal court recently entered an injunction against the same types of warrantless arrests of nude dancers. *SOB, Inc. v. County of Benton*, 171 F. Supp. 2d 978, 984 (D. Minn. 2001). The United States Court of Appeals for the Fifth Circuit and the Hawaii Supreme Court have similarly held that police officers must obtain warrants before arresting any "promoter" or purveyor of allegedly obscene material. *See Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1361-62 (5th Cir. 1980) (arrests of individuals must "comport with the minimum constitutional requirements enumerated in *Heller* and *Roaden*"); *State v. Furuyama*, 637 P.2d 1095, 1100-01 (Haw. 1981) ("[A] police officer may not effect a warrantless arrest in a setting where first amendment freedoms are implicated.").

The Northern District of Texas, on the other hand, has held that warrantless arrests of nude dancers – at least so long as they occur during moments in which the dancers are actually performing – do not violate the First and Fourth Amendments. The court held that "[t]hough technically correct" that such arrests operate as prior restraints, warrantless arrests are lawful because "the performer may post bail and resume her 'expression' as quickly as logistics permit." *Kew v. Senter*, 416 F. Supp. 1101, 1105-06 (N.D. Tex. 1976).

Compounding the confusion on this issue, two state courts that cover Chicago and New York City – the Illinois Court of Appeals and the New York Criminal Court – each have issued two contradictory rulings on the constitutionality of warrantless arrests of individual dancers. *Compare City of Chicago v. Festival Theatre Corp.*, 410 N.E.2d 341, 353-55 (Ill. App. 1980) (live adult entertainment that includes simulated sex acts is entitled to at least as much protection against prior restraints as are books and films), *aff'd on other grounds*, 438 N.E.2d 295 (Ill. 1982), *with City of Chicago v. Hanson*, 435 N.E.2d 120, 124-25 (Ill. App. 1982) ("mere arrest and prosecution of [dancers] charged with obscenity [does] not necessitate a prior judicial determination of obscenity" because live performances are different than "celluloid and other written materials") *and People v. Adais*, 114 Misc. 2d 773, 452 N.Y.S.2d 453 (N.Y.C. Crim. Ct. 1982) (holding that First and Fourth Amendments prohibit warrantless arrests of dancers in an adult nightclub because "[i]t is almost preposterous to believe that systems of censorship prohibited by our Constitution as to book publishers and film producers ought not be prohibited as to our dancers. . . . ") *with People v. Morgan*, 86 Misc. 2d 377, 382, 382 N.Y.S.2d 666 (N.Y.C. Crim. Ct. 1976) (holding that no pre-arrest judicial determination regarding obscenity is required because nude dancing "differs completely from the constancy of the printed word, the celluloid film, or even the live performance which proceeds pursuant to a predetermined format or script"). The law on this important issue is thus utterly unclear in two of America's three largest cities.

A decision from this Court on the scope of the warrant requirement in the anti-obscenity context is necessary to guide the actions of police officers, as well as promoters, entertainment companies, dancers, and other live performers throughout this country and to restore coherence to the scope of the First and Fourth Amendments' protections against prior restraints of free expression.

B. The Washington Supreme Court's Holding that Constitutional Protections Against Prior Restraints Do Not Apply to Live Entertainment with Exclusively "Nonverbal Elements" is Incorrect and Has Grave Implications for the Law of Free Expression.

In considering whether the *Marcus/Roaden* warrant requirement applies to arrests of live dancers and promoters, the Washington Supreme Court acknowledged that this Court held in *Southeastern Promotions* (a case involving the musical "Hair") that live entertainment is entitled to the same level of First Amendment protection against prior restraints as is other types of expression, such as books and films. Pet. App. 10 (citing *Southeastern Promotions*, 420 U.S. at 557-58).[3] But the Washington Supreme Court refused to deduce from *Southeastern Promotions* that the warrant requirement that applies to books and films must also apply to this case. The majority of that Court reasoned that "*Southeastern* appears to deal with a category of expression which excludes the kind of nude dancing at issue here" because this type of nude dancing lacks "verbal elements" and, thus, receives "less protection under the First Amendment than do books and film." Pet. App. 7, 11. In short, under the Washington Supreme Court's holding, the First and Fourth Amendments require police officers to obtain warrants before arresting nude dancers for obscenity violations if the dancing at issue is accompanied by "verbal elements," but not if it

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[3] In *Southeastern Promotions*, while addressing what First Amendment standard applies to live entertainment, this Court gave the same answer as it did when it first confronted films: " '[T]he basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.' " 420 U.S. at 557 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

involves only "nonverbal" expression "of the sort found in adult entertainment establishments." Pet. App. 11.

This holding is in serious tension with this Court's free-expression jurisprudence and contravenes basic First and Fourth Amendment principles. There is nothing in this Court's *Marcus/Roaden* line of cases suggesting that the warrant requirement that applies to books and films should not apply to live performers and promoters. The warrant requirement elucidated in *Marcus* and *Roaden* is grounded in the need for governmental regulation of obscenity to follow "procedures that will ensure against curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line." *Bantam Books*, 372 U.S. at 66. A "searching" judicial inquiry by a neutral judicial officer concerning whether the expression at issue is, in fact, obscene thus reduces the possibility that a police officer will erroneously restrain free expression based on his own "conclusory opinion" that the expression is obscene. *Roaden*, 413 U.S. at 502-06; *Marcus*, 367 U.S. at 731-32.[4] Warrantless seizures in such situations are also unnecessary to preserve evidence of a crime. *See Roaden*, 413 U.S. at 505.

These considerations apply with equal, if not greater, force in the context of arrests of individuals suspected of performing or promoting obscene expression. As this

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[4] The concern that police officers will improperly censor free expression is not meant to suggest that officers will necessarily act in bad faith. To the contrary, as this Court has explained, "[i]t is no reflection on the good faith or judgment of the officers to conclude that the task they were assigned was simply an impossible one to perform with any realistic expectation that the obscene might be accurately separated from the constitutionally protected." *Marcus*, 367 U.S. at 732. The City, indeed, acknowledges here that requiring its officers "to consider whether [they] are witnessing obscenity" imposes "obvious and significant . . . burdens on law enforcement." Pet. 23.

Court observed *Marcus*, "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." 367 U.S. at 729. This history of abuse to which the Framers were reacting included warrantless arrests of individuals, not just warrantless seizures of books, *see id.* at 728 – and modern "expression," of course, still takes the form of live entertainment as well as written text.

It is no easier to determine whether live entertainment is obscene than it is to decide whether printed material or a film is obscene. And arresting dancers and an individual promoter of allegedly obscene live expression can squelch that expression just as readily as seizing a film and arresting the theatre's manager and projectionist (the action that occurred in *Roaden*, 413 U.S. at 497-98) can. It is, therefore, equally critical in the context of live entertainment that a police officer present a recording or a description of the expression at issue to a neutral judicial officer before making any seizures based on anti-obscenity ordinances. Indeed, if anything, the need for a judicial determination of obscenity is more important in the context of arresting individuals because personal liberty is at stake and because seizing people instead of mere objects can shut down an entire expressive venue. *See Roaden*, 413 U.S. at 504 (expressing particular concern regarding seizures that bring "to an abrupt halt an orderly and presumptively legitimate . . . exhibition").

The Washington Supreme Court's protestation that nude dancing of the sort found in adult entertainment establishments "receives less protection under the First Amendment than do books and film," Pet. App 7, 11, is based on a false comparison and ignores the reality that the expression at issue in *Marcus* and *Roaden* was also sexually explicit and also took place in adult establishments. The proper comparison in this case is not between nude dancing and books and films generally, but rather between dancing generally and books or films generally –

or, perhaps even more appropriately, between nude dancing and sexually explicit books and film. When that correction is made, it becomes clear that while nude dancing may fall "only within the outer ambit of the First Amendment protection," *City of Erie v. Pap's A.M.*, 529 U.S. 277, 284 (2000), books and films sold in adult bookstores and theatres that depict sexually explicit pornography reside no closer to core First Amendment values. *Miller v. California*, 413 U.S. 15 (1973) (sexually explicit material); *see also Dima Corp. v. Town of Hallie*, 185 F.3d 823, 827 (7th Cir. 1999) ("sexually explicit, non-obscene" books receive same level of protection as nude dancing). To the extent that certain dancing – or a certain book or film – is so sexually explicit (yet non-obscene) that it might somehow be entitled to less than full First Amendment protection, the uncertainty inherent in that sort of classification underscores the need for a pre-arrest judicial inquiry into exactly what type of expression is at issue.[5]

It is no answer to attempt to distinguish – as the Washington Supreme Court did – between the nude dancing involved in *Southeastern Promotions* and the nude dancing involved here on the basis of whether the dancing contains "verbal elements." Pet. App. 11. Although this Court has never expressly ruled that expression with

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[5] Assuming that a category of expression can be defined with sufficient precision as involving sexually explicit, non-obscene speech, the federal circuits – as well as leading constitutional commentators – are split over whether this category of expression would be entitled to less than full First Amendment protection. *Compare, e.g., Dima Corp.*, 185 F.3d at 827 (reduced protection) *with Colacurcio v. City of Kent*, 163 F.3d 545, 550 (9th Cir. 1998), *and Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986) (full protection and discussing scholarly confusion over issue). The only relevant point for this case, however, is that all courts agree that sexually explicit, non-obscene books and films are entitled to the same level of First Amendment protection (whatever that level may be) as is sexually explicit, non-obscene live entertainment.

solely nonverbal elements is entitled to the same level of First Amendment protection as that with verbal elements, this Court consistently has treated the two types of expression the same way. This Court held, for instance, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), that parades are form of expression and that "[t]he protection that inheres in a parade *is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression.*" *Id.* at 569 (emphasis added). This Court further explained that a particularized message is "not a condition of constitutional protection," for otherwise the First Amendment "would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Id.* The first two of these mediums, of course, lack any verbal component.

Closer to home for purposes of this case, while the Washington Supreme Court's opinion seems to condone the Seattle police department's policy of making warrantless arrests of any ballet dancer who touches her buttocks or breasts, *see* Opp. App. 23, this Court has stated that a performance of "Ballet Africains" (an overtly erotic nude dance without any verbal component) is of "unquestionable artistic and socially redeeming significance" without ever suggesting that its lack of verbiage reduces its level of First Amendment protection. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933 (1975). Other courts also have recognized that expressive performances of pantomime, Western ballet, and the lambada are entitled to just as much protection as comparable verbal counterparts. *See Elam v. Bolling*, 53 F. Supp. 2d 854, 859-60, 863 (W.D. Va. 1999); *In re Giannini*, 446 P.2d 535, 538-40 (Cal. 1968). In short, no court other than the Washington Supreme Court has ever distinguished between two kinds of dance based upon the presence or absence of verbal elements. Rather, the uniform rule until this decision was that "it is . . . not simply the verbal or nonverbal nature of the expression,

but the governmental interest at stake, that helps determine whether a restriction on that expression is valid." *Texas v. Johnson*, 491 U.S. 397, 406 (1989); *see also Monroe v. State Court*, 739 F.2d 568, 574 (11th Cir. 1984) ("[D]irect governmental regulation of nonverbal expression should be subject to the same limitations under the first amendment as direct regulation of verbal expression."). Permitting a ruling to stand that apparently would now distinguish not only between equivalent types of dancing, but also, for example, between classical music or jazz on the one hand and verbal pop music on the other has grave implications for the law of free expression. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of communication and expression, is protected under the First Amendment.").[6]

Finally, the Washington Supreme Court's analysis of this issue completely overlooks the fact that the *Marcus/Roaden* warrant requirement is based not only on First Amendment protections, but also on the "reasonableness" mandate of the Fourth Amendment. *See Roaden*, 413 U.S. at 501-02. This Court has expressly held that the Fourth Amendment provides individuals at least as much procedural protection against warrantless arrests as it provides to warrantless seizures of inanimate objects. *See, e.g., Steagald*, 451 U.S. at 213; *Payton*, 445 U.S. at 585-90.

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[6] The illogicality of the Washington Supreme Court's verbal/nonverbal distinction is also apparent when one considers its consequences inside of adult entertainment establishments. The Court's acknowledgement that police officers must obtain warrants when nude dancing is accompanied by signing or a script – as it was in *Southeastern Promotions* – means that future nude dancing in adult entertainment establishments apparently may receive protection of the warrant requirement if the dancers use words on stage or if they and their manager prepare a script for the performances. *See* App. 11. Substantive First and Fourth Amendment protections should not depend on such formalistic distinctions.

Thus, if police officers must obtain a warrant before seizing an object that is allegedly obscene, they must also obtain a warrant before seizing a person on the same basis.

II. THIS COURT SHOULD DECIDE WHETHER POLICE OFFICERS MAY ARREST INDIVIDUALS FOR VIOLATING ANTI-OBSCENITY STATUTES WITHOUT FIRST ACTUALLY CONCLUDING THAT THE EXPRESSION AT ISSUE IS, IN FACT, OBSCENE.

In *Whren v. United States*, 517 U.S. 806 (1996), this Court reaffirmed the rule enunciated in *Scott v. United States*, 436 U.S. 128 (1978), that police officers' "[s]ubjective intentions play no role in *ordinary*, probable-cause Fourth Amendment analysis." *Id.* at 813 (emphasis added). An arrest, this Court explained, ordinarily satisfies Fourth Amendment strictures "so long as the circumstances" that were known to the officer at the time, "viewed objectively," support a *post hoc* determination of probable cause. *Id.* at 813 (quoting *Scott*, 436 U.S. at 136). Thus, it ordinarily is immaterial whether arresting officers pay any attention at all to statutory elements of crimes or whether they actually conclude before arresting an individual that probable cause exists to believe that that individual has violated *any* law. *See Scott*, 436 U.S. at 138 ("We have . . . held that the fact that the officer does not have the state of mind hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.") (citing *United States v. Robinson*, 414 U.S. 218 (1973)).

This Court, however, has never addressed whether this purely objective, *post hoc* probable-cause rule applies to arrests of individuals involved in expression that is presumptively protected by the First Amendment. In this case, the Washington Supreme Court held that it did. It held that *Whren*'s and *Scott*'s "ordinary, probable-cause

Fourth Amendment analysis" applies to arrests for sexually explicit expression – that is, to arrests for activity that arguably is protected by the First Amendment. Pet. App. 19-20. The Washington Supreme Court thus concluded that the fact that the police officers here failed to consider whether the dancers' performances were obscene before arresting them and their promoter was "not necessarily fatal" to the City's claim that its officers had probable cause to make those arrests. Pet. App. 19. This Court should review this ruling and – in the event that it decides that police officers need not obtain pre-arrest warrants in such situations – hold that the general rule that arrests are valid so long as a post-arrest, objective appraisal of the facts establishes probable cause does not apply in the special circumstance when, as here, arrests pose a risk of operating as a prior restraint on free expression. When arrests pose such a risk, the First and Fourth Amendments require, at a bare minimum, that police officers actually conclude that the expression at issue is obscene *before* arresting any individuals.

This Court consistently has held in contexts similar to this one that the ordinary rules governing probable cause do not apply when First Amendment interests are implicated. In summarizing the *Marcus/Roaden* line of cases, this Court explained that "while the *general rule* under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause . . . , it is otherwise when materials presumptively protected by the First Amendment are involved." *Fort Wayne Books*, 489 U.S. at 63 (emphasis added). Police officers may not seize materials presumptively protected by the First Amendment until a judicial officer actually has determined that they are obscene. *Roaden*, 413 U.S. at 504-06; *Marcus*, 367 U.S. at 731-33; *see also Alexander v. United States*, 509 U.S. 544, 577 (1993) (Kennedy, J., dissenting) ("we have been careful to say that First Amendment materials cannot be taken out of circulation *until they have been determined to be unlawful*") (emphasis added). The reason for the special treatment of

expressive materials is that any pre-adjudication seizure of constitutionally protected expression constitutes a prior restraint. *See Macon,* 472 U.S. at 470.

These same considerations require, at the very least, that police officers themselves actually determine that they are witnessing obscene expression before arresting any individual promoter or live performer pursuant to an anti-obscenity ordinance. Nude dancing is presumptively protected expression, and an arrest of a person engaged in protected expression undoubtedly constitutes a prior restraint. *See, e.g., Southeastern Promotions,* 420 U.S. at 554-57. And "the settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.' " *Id.* at 559 (quoting *Freedman v. Maryland,* 380 U.S. 51, 58 (1965)).

The Washington Supreme Court's rule that police officers need not even consider whether they are witnessing obscene conduct before arresting performers or promoters pursuant to an adult entertainment regulation lacks a single "procedural safeguard[ ] designed to obviate the dangers of a censorship system." *Southeastern Promotions,* 420 U.S. at 559. A judicial determination after an arrest has taken place that the conduct at issue constituted protected expression comes far too late to cure any harm resulting from censoring the individual's message. Indeed, even the other decisions that have held that police officers need not obtain warrants before making arrests under anti-obscenity statutes have expressly assumed that the officers themselves would make obscenity determinations before undertaking any such arrests. *See Hanson,* 435 N.E.2d at 123 (officers arrested performers based on reasonable belief that performance was obscene); *Morgan,* 86 Misc. 2d at 378, 382-83 (officers will come "to the reasonable belief that an obscene act is occurring in his presence" before making arrest).

The Washington Supreme Court's refusal to require at least police officers to make obscenity determinations

before arresting individuals not only imposes an unacceptable prior restraint, but also threatens to have a substantial chilling effect that dissuades individuals from even attempting to exercise their First Amendment rights. If the only protection that dancers, entertainers, and promoters have against unconstitutional arrests for engaging in sexually explicit, non-obscene expression is a post-arrest successful motion in criminal court proceedings (and a subsequent civil rights action in which they will be saddled with the burden of proving that there was no probable cause to believe that their performances were obscene), then many such individuals will simply refrain from exercising their First Amendment rights.

If this Court declines to hold that a judicial determination of obscenity must precede any arrest of a live performer or promoter, it should at least hold that the First Amendment interest in preventing prior restraints requires police officers themselves to make such determinations prior to making any such arrests.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR CONSIDERING THE TWO QUESTIONS PRESENTED.

In considering whether this case is a suitable vehicle for considering the Questions Presented, this Court should bear two issues in mind: (a) whether the facts of this case squarely and cleanly present the questions presented; and (b) whether this Court has jurisdiction over the rulings of the Washington Supreme Court regarding these questions. Each of these considerations counsels toward granting review here.

A. The Facts of this Case Squarely and Cleanly Present the Questions Presented.

There is no dispute regarding the facts underlying the two Questions Presented in this conditional cross-petition. First, it is undisputed that the police officers made the arrests at issue pursuant to an anti-obscenity

statute and that they did so without any warrants or prior judicial determinations of obscenity. Pet. App. 3. Second, it is undisputed that none of the police officers themselves considered whether the performances at issue were obscene before they arrested the dancers and promoters. Pet. App. 19. This case, in fact, is an especially ideal vehicle for considering the two Questions Presented because the police here arrested both live performers and their individual promoter. To the extent that this Court might be inclined to think that different legal rules should apply to these two different types of individuals, this case allows this Court to consider both situations in the same case.

This case also highlights the prior restraint problem that is inherent in arrests of live entertainers. When the police arrested the dancers and the promoter, the officers also asked the nightclub's customers to leave the premises. The promoter had to close the nightclub for over one hour. Yet none of the dancers (nor the promoter) was ever convicted of obscene conduct or any other crime. The City tried one of the dancers in municipal court, but the jury acquitted her. Pet. App. 29. The City dismissed the charges against all of the other arrested individuals. Pet. App. 29.[7] Hence, the City's arrests pretermitted several presumably constitutionally protected exhibitions without any justification for doing so.

Lastly, the fact that the issues in this lawsuit are raised under 42 U.S.C. § 1983, rather than in response to a criminal prosecution, makes it clear that there are no alternate federal grounds for decision. In a criminal case, this Court may decline to reach the constitutionality of an

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[7] The City's preamble to its questions presented is thus seriously misleading. The City states that "Seattle police officers arrested adult entertainers after observing *violations* of the standards of conduct set forth in Seattle's adult entertainment ordinance." Pet. i (emphasis added). In fact, a jury found one entertainer *not guilty* of violating that ordinance, and the City elected not to prosecute the rest of the entertainers. App. 29.

arrest if the defendant is acquitted or if this Court concludes that other evidence untainted by the arrest supports the defendant's convictions. But here, the Cross-Petitioners seek declaratory and injunctive relief as well as damages under 42 U.S.C. § 1983 regarding the legality of their arrests and the City's custom of arresting individuals for violations of SMC 6.270.100 without obtaining constitutionally sufficient warrants (or even requiring officers themselves to make pre-arrest determinations of obscenity). These claims squarely present the First and Fourth Amendment Questions Presented in this conditional cross-petition.

B. This Court Possesses Jurisdiction Over the Washington Supreme Court's Rulings Involved in this Conditional Cross-Petition.

The Washington State courts have not yet issued final judgments regarding all of the issues involved in this lawsuit. Although this actuality, in our view, deprives this Court of jurisdiction over the City's petition for certiorari, *see* Respondents' Br. in Opp. at 15-20, it does not necessarily deprive this Court of jurisdiction over the Questions Presented in this conditional cross-petition. The questions involved in this cross-petition satisfy an exception to the final judgment rule because – unlike the questions that the City presents – they concern important First Amendment rights that would be *undermined* or *underprotected* if this Court foregoes review of them.

This Court held in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), that it may exercise jurisdiction over state court judgments that have not terminated state court proceedings when:

> the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the

> state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court [may] entertain[ ] and decide[ ] the federal issue.

Id. at 482-83.

This Court repeatedly has invoked this rule to assume jurisdiction in cases where states' highest courts have finally decided a First Amendment issue in a manner that erodes or underprotects the right to free expression. *Fort Wayne Books,* 489 U.S. at 56-57 ("where an important First Amendment claim *is* before us" the federal policy at issue is significant enough to invoke the *Cox* exception); *see also Cox,* 420 U.S. at 485-87 (state court ruling that First Amendment did not protect media's right to produce certain information); *National Socialist Party v. Skokie,* 432 U.S. 43, 44 (1978) (per curiam) (state court ruling that First Amendment did not protect an organization's march); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 247 n.6 (1974) (state court ruling that First Amendment did not protect newspaper's actions). Indeed, in *Fort Wayne Books* this Court has applied this *Cox* exception to assume jurisdiction over an interlocutory state court decision involving essentially the same kind of issue as is presented here – namely, a state court decision holding that the *Marcus/Roaden* warrant requirement did not apply to seizures of books and films pursuant to a state RICO statute. *Fort Wayne Books,* 489 U.S. at 54-57.

This precedent dictates that this Court has jurisdiction over this cross-petition. The Washington Supreme Court finally has determined that the First and Fourth Amendments do not require police officers to obtain constitutionally sufficient warrants or even themselves to

consider the issue of obscenity before making arrests pursuant to anti-obscenity ordinances. Pet. App. 11-12, 19-20. The questions presented here, as in *Fort Wayne Books*, thus "call into question the legitimacy of the law enforcement practices of several States" under the "limits [of] the First Amendment." *Fort Wayne Books*, 489 U.S. at 56; *see also supra* at section I.A (discussing other States' decisions upholding police arrest policies similar to the one at issue here). Furthermore, as in *Cox*, "if [this Court] now holds that the First and Fourteenth Amendments," as well as the Fourth Amendment, forbids such arrests, "this litigation ends" with respect to the legality of the City's arrests. 420 U.S. at 486.

Despite the presence of this Court's jurisdiction over the warrant and *post hoc* determination issues in this case's current procedural posture, Cross-Petitioners elected not to initiate certiorari proceedings at this stage of affairs. After issuing its initial decision in this case, the Washington Supreme Court entered an order changing its opinion to clarify that the Washington Court of Appeals should consider on remand "the availability of injunctive or declaratory relief under the state constitution" on the ground that Wash. Const. Art. I, § 5 requires police officers to obtain a warrant before arresting individuals for violations of SMC 6.270.100. Pet. App. 47. (Briefing on that remand is currently underway and is scheduled to be completed in late May of 2002. Opp. App. 25-27.) The Washington Supreme Court also has recalled its mandate regarding this case, further indicating that it views its instant decision as interlocutory in nature. Opp. App. 24; Wash. R. App. Proc. 12.5(a).[8] Therefore, in the current remand or in further proceedings in the Washington Supreme Court, Cross-Petitioners may still obtain an

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[8] Wash. R. App. Proc. 12.5(a) provides in pertinent part that "[a] 'mandate' is the written notification by the clerk of the appellate court to the trial court and to the parties of an appellate court decision terminating review. No mandate issues for an interlocutory decision of the appellate court."

injunction and declaratory judgment (but not damages) on state law grounds that mirrors the ones they seek on First and Fourth Amendment grounds.

Cross-Petitioners are content to let these remand proceedings in the Washington Court of Appeals play their way out before considering invoking the jurisdiction of this Court. But if this Court decides that it is preferable for it to intervene in this litigation now, they urge this Court to review the issues presented here in addition to those presented in the City's petition for certiorari.

CONCLUSION

For the foregoing reasons, if this Court grants the City's petition for a writ of certiorari in this case, it also should grant Cross-Petitioners' conditional cross-petition for a writ of certiorari.

RESPECTFULLY SUBMITTED this 10th day of April, 2002.

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